

**IOWA DEPARTMENT OF NATURAL RESOURCES  
ADMINISTRATIVE CONSENT ORDER**

IN THE MATTER OF:  <b>STEVE ELSBERND</b>  <b>Winneshick County</b>	ADMINISTRATIVE CONSENT ORDER  NO. 2008-AFO-12
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TO: Steve Elsbernd  
2809 280<sup>th</sup> Street  
Ridgeway, Iowa 52165

**I. SUMMARY**

This administrative consent order is entered into between the Iowa Department of Natural Resources (DNR) and Steve Elsbernd for the purpose of resolving the issues surrounding a manure discharge at Mr. Elsbernd's facility and the resulting fish kill in Ten Mile Creek. In the interest of avoiding litigation, the parties have agreed to the provisions below.

Questions regarding this administrative consent order should be directed to:

**Relating to technical requirements:**

Amber Sausser, Field Office 1  
Iowa Department of Natural Resources  
909 West Main, Suite 4  
Manchester, Iowa 52057  
Phone: (319) 927-2640

**Relating to legal requirements:**

Kelli Book, Attorney for the DNR  
Iowa Department of Natural Resources  
7900 Hickman Road, Suite 1  
Urbandale, Iowa 50322  
Phone: 515/281-8563

**Payment of penalty to:**

Iowa Department of Natural Resources  
Henry A. Wallace Building  
502 East Ninth Street  
Des Moines, Iowa 50319-0034

**II. JURISDICTION**

This administrative consent order is issued pursuant to Iowa Code section 455B.175(1) which authorizes the Director to issue any order necessary to secure compliance with or prevent a violation of Iowa Code Chapter 455B, Division III, Part 1 and Iowa Code Chapter 459 and the rules adopted or permits issued pursuant thereto, and Iowa Code section 455B.109 and 567 Iowa Administrative Code (IAC) Chapter 10, which authorize the Director to assess administrative penalties.

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**III. STATEMENT OF FACTS**

1. Steve Elsbernd owns and operates an animal feeding facility located at 2809 280<sup>th</sup> Street in Ridgeway, Iowa. Mr. Elsbernd's facility consists of a 170 head dairy operation with an open lot, parlor, and freestyle barns. Additionally, Mr. Elsbernd has 35 calves, 300 confined finish hogs and a small number of open lot hogs. The confinement manure goes into a concrete storage basin.

2. On August 14, 2007 at 8:07 p.m. Amber Sauser, DNR Field Office 1 environmental specialist, received a page from Mr. Elsbernd. He stated that he had been alerted to a breach in the concrete storage basin at his facility. The breach occurred between 6:00 p.m. and 6:30 p.m. causing manure to flow through the cornfield and into Ten Mile Creek. Mr. Elsbernd estimated approximately 130,000 gallons of manure left the storage structure. He stated that as soon as he stopped the breach in the storage structure that he constructed an earthen berm to prevent additional manure from entering the stream. Mr. Elsbernd estimated that approximately 40,000 gallons of manure entered the stream prior to the construction of the berm.

3. On August 15, 2007, Ms. Sauser and Tom McCarthy, DNR Field Office 1 environmental specialist senior, began the investigation of the manure discharge at Mr. Elsbernd's facility. Ms. Sauser and Mr. McCarthy began the investigation downstream of Mr. Elsbernd's facility at the 270<sup>th</sup> Street bridge over Ten Mile Creek. They noted a strong manure odor and brown water. There were dead and dying fish at this location. A laboratory sample was collected and the results indicated an ammonia nitrogen level of 100 mg/l.

4. Ms. Sauser and Mr. McCarthy then proceeded to the 280<sup>th</sup> Street bridge north of 2753 280<sup>th</sup> Street. The bridge goes over an unnamed tributary of Ten Mile Creek. The field staff did not observe any manure odor or water discoloration. A laboratory sample was collected and the results indicated an ammonia nitrogen level of 0.50 mg/l. At this point, Mr. McCarthy notified DNR Fisheries of the dead fish in Ten Mile Creek.

5. Ms. Sauser and Mr. McCarthy proceeded to Mr. Elsbernd's facility where an employee showed them the manure storage structures where the breach had occurred. The field staff observed that approximately three feet of manure had been released from the basin and they estimated that approximately 160,000 gallons of manure had been released. The manure flowed from the basin south through an access path to Ten Mile Creek. Mr. Elsbernd's employee then took the field staff to Ten Mile Creek. Ms. Sauser and Mr. McCarthy observed that an earthen berm had been constructed and was pooling the manure flow. The field staff observed that areas of the berm had been breached, and they talked with the employee about repairing the berm. Ms. Sauser and Mr. McCarthy observed turbid water with a manure odor and manure solids entering Ten Mile Creek. A laboratory sample was collected and the results indicated an ammonia nitrogen level of 330 mg/l. The field staff observed upstream conditions and noted live fish and no manure odor. Laboratory samples from 25 feet upstream were collected and the results indicated an ammonia nitrogen level of 0.19 mg/l and a biochemical oxygen demand level of 3 mg/l. The field staff also observed

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downstream conditions and noted a manure odor, manure solids, and water discoloration. Laboratory samples from 10 feet downstream were collected and results indicated an ammonia nitrogen level of 64 mg/l and a biochemical oxygen demand level of 950 mg/l. The field staff checked points upstream of the facility and did not observe any indications of other sources of manure. They also checked points downstream of the facility and just east of the 270<sup>th</sup> Street bridge Ten Mile Creek disappeared into a sink hole.

6. Following the investigation, Ms. Sauser stayed in contact with Mr. Elsbernd to ensure that he was installing proper berms and pumping the area to limit the impact on Ten Mile Creek.

7. On September 6, 2007, a Notice of Violation letter was issued to Mr. Elsbernd for the violations discovered during the field office investigation. The letter cited Mr. Elsbernd for failing to maintain the minimum manure controls, violating the general water quality criteria, and for a prohibited discharge.

8. The fish kill evaluation by the DNR Fisheries personnel concluded that 9,798 fish valued at \$1,488.67 were killed. The cost of performing this evaluation was \$521.63. The total fish kill assessment totals \$2,010.30.

**IV. CONCLUSIONS OF LAW**

1. Iowa Code section 459.103 provides that the Environmental Protection Commission shall adopt rules related to the construction or operation of animal feeding operations, including permit and minimum manure control requirements. The Commission has adopted such rules at 567 IAC Chapter 65.

2. Iowa Code section 455B.186 and 567 IAC 62.1(1) prohibit the discharge of pollutants into water of the state, except for adequately treated pollutants discharged pursuant to a permit from the DNR. Mr. Elsbernd's facility does not have a permit and DNR Field Office 1 found evidence of a discharge of untreated pollutants into waters of the state. The above-facts indicate a violation of this provision.

3. Iowa Code section 459.311(1) and 567 IAC 65.2(3) state the minimum level of manure control for a confinement feeding operation shall be the retention of all manure produced in the confinement enclosures between periods of manure application. In no case shall manure from a confinement feeding operation be discharged directly into a water of the state or into a tile line that discharges to waters of the state. Manure from Mr. Elsbernd's facility was discharged from the facility and traveled to Ten Mile Creek. The above-facts disclose a violation of this provision.

4. 567 IAC 61.3(2) provides general water quality criteria and prohibits discharges that will produce objectionable color, odor or other aesthetically objectionable conditions; settle to form sludge deposits; interfere with livestock watering; or are toxic to animal or plant life. DNR Field Office 1 observed manure solids from Mr. Elsbernd's

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facility in Ten Mile Creek. The field staff observed discolored water with a manure odor as well as dead and dying fish. The above-facts disclose a violation of one or more of these criteria.

5. Iowa Code section 481A.151 provides that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay restitution to the DNR for injury caused to a wild animal by the pollution. The DNR has adopted 571 IAC Chapter 113. 571 IAC 113 provides that a person who is liable for polluting a water of this state in violation of state law shall also be liable to pay restitution to the DNR for injury caused to a wild animal by the pollution. A fish kill resulted from the manure discharge at Mr. Elsbernd's facility.

**V. ORDER**

THHEREFORE, it is hereby ordered and Steve Elsbernd agrees to do the following:

1. Steve Elsbernd shall submit a Plan of Action to DNR Field Office 1 within 20 days of the date the Director signs this administrative consent order. The Plan of Action shall provide for adequate manure storage until such time that the containment structure can be properly repaired;
2. Steve Elsbernd shall submit a structural engineer's evaluation of the concrete manure storage structure to DNR Field Office 1 within 90 days of the date the Director signs this administrative consent order. Along with the evaluation, Steve Elsbernd shall submit a plan and timeline to repair the structure;
3. Steve Elsbernd shall pay restitution in the amount of \$2,010.30 within 30 days of the date the Director signs this administrative consent order; and
4. Steve Elsbernd shall pay a penalty of \$3,500.00 within 30 days of the date the Director signs this administrative consent order.

**VI. PENALTY**

1. Iowa Code sections 455B.191 and 459.603 authorize the assessment of civil penalties of up to \$5,000.00 per day of violation for each of the water quality violations involved in this matter.

2. Iowa Code section 455B.109 authorizes the Environmental Protection Commission (Commission) to establish by rule a schedule of civil penalties up to \$10,000.00, which may be assessed administratively. The Commission has adopted this schedule with procedures and criteria for assessment of penalties in 567 IAC Chapter 10. Pursuant to these rules, the DNR has determined that the most effective and efficient means of addressing the above-cited violations is the issuance of an administrative consent order with an administrative penalty. The administrative penalty assessed by this administrative consent

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order is \$3,500.00. The administrative penalty is determined in accordance with the following:

Economic Benefit – Failure to properly contain all manure allowed Mr. Elsbernd to save time and money. However, any economic benefit Mr. Elsbernd received was minimal because of the actions Mr. Elsbernd and his employees took following the discharge to prevent further impact on Ten Mile Creek. Therefore, no economic benefit is being assessed in this administrative consent order.

Gravity of the Violation One of the factors to be considered in determining the gravity of a violation is the amount of penalty authorized by the Iowa Code for that type of violation. As indicated above, substantial civil penalties are authorized by statute. Despite the high penalties authorized, the DNR has decided to handle the violations administratively at this time, as the most equitable and efficient means of resolving the matter. Actual harm to the environment was documented by the impact to Ten Mile Creek, including over 9,000 dead fish. Additionally, the stream disappeared into a sink hole downstream of the facility. The manure control and water quality violations threaten the integrity of the water quality program. Based on the above considerations, \$3,000.00 is assessed for this factor.

Culpability – Steve Elsbernd has a duty to remain knowledgeable of DNR's requirements and to be alert to the probability that his conduct is subject to DNR's rules. Mr. Elsbernd did take the appropriate actions upon discovering the discharge and did take the appropriate steps to minimize the impact on Ten Mile Creek. Based on the above considerations, \$500.00 is assessed for this factor.

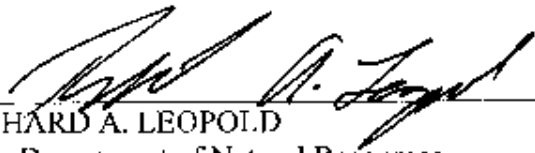
## VII. WAIVER OF APPEAL RIGHTS

This administrative consent order is entered into knowingly and with the consent of Steve Elsbernd. For that reason, Steve Elsbernd waives the right to appeal this administrative consent order or any part thereof.

## VIII. NONCOMPLIANCE

Failure to comply with this order, including failure to timely pay any penalty, may result in the imposition of further administrative penalties or referral to the attorney general to obtain injunctive relief and civil penalties pursuant to Iowa Code section 455B.191. Compliance with Section "V. Order" of this administrative consent order constitutes full satisfaction of all requirements pertaining to the specific violations described in Section "IV. Conclusions of Law" of this administrative consent order. DNR reserves the right to bring enforcement action, including penalties, or to request that the attorney general initiate legal action to address other violations not described in Section "IV. Conclusions of Law" of this administrative consent order but which may arise from the facts summarized in Section "III. Statement of Facts" of this administrative consent order. DNR specifically reserves the right to pursue enforcement action, including penalties, for any current violations not specifically cited in this order.

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ISSUED TO: STEVE ELSBERND

  
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RICHARD A. LEOPOLD  
Iowa Department of Natural Resources

Dated this 25 day of  
April, 2008.

  
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STEVE ELSBERND

Dated this 14 day of  
April, 2008.

#No facility number; Kelli Book; Field Office 1; Gene Tinker; EPA; I.C.1 and VIII.D.1.a